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No. 81-323

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

SMITH STEEL WORKERS D.A.L.U. 19806, AFL-CIO
Petitioner,

v.

DARREL C. NOTTELSON

and

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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REPLY BRIEF FOR PETITIONER

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TABLE OF CONTENTS

	Page
I. THE RELATIONSHIP BETWEEN TITLE VII AND THE NLRA	2
II. THE CONSTITUTIONAL ISSUE	5
CONCLUSION	8

TABLE OF AUTHORITIES

Cases:

Railway Employees' Department v. Hanson, 351 U.S. 225	7
Teamsters v. United States, 431 U.S. 324	4
Trans World Airlines, Inc. v. Hardison, 432 U.S. 63	3-6

Constitution and Statutes:

Constitution, First Amendment	5-7
Civil Rights Act of 1964, Title VII	*passim*
National Labor Relations Act	2-5
Railway Labor Act	7

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Subsequent to the filing of the petition herein, petitions have been filed in two other cases presenting the same issues. *United Steelworkers of America, Local 8141* v. *Tooley*, No. 81-572 [1]; *International Association of Machinists, Lodge 50* v. *Anderson*, No. 81-679.

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[1] The petition in *Tooley* raises a third question not presented by *this* petition: the application of § 701(j)'s "undue hardship" exception to a union that is confronted with the loss of six religious objectors' dues totalling $1,200 per year (3% to 5% of the union's total revenue). The only "undue hardship" issue in the instant case is raised in the employer's petition, No. 81-97, and that issue concerns the employer's hardship, not the union's.

I. THE RELATIONSHIP BETWEEN TITLE VII AND THE NLRA.

a. Respondent EEOC acknowledges that although it had construed Title VII to impose a duty of reasonable accommodation prior to the 1972 amendments, it had understood that duty not to require unions to exempt religious objectors from dues obligations under union security agreements (EEOC Br. 10-11, n. 9). But the EEOC contends that its pre-1972 construction is not informative of the meaning of the almost identically-worded "reasonable accommodation" duty expressly enacted by Congress in the 1972 amendments to Title VII:

> [T]he Commission did not believe that its [pre-1972] guidelines could create an exception to the National Labor Relations Act. However, such an exception was expressly created by Congress in 1972, when it enacted Section 701(j). [*Ibid*].

But 701(j) does not "expressly" create such an exception; the issue is whether the general language of § 701(j) should be construed as impliedly repealing in part the Congressional decision in the NLRA to permit agreements requiring uniform financial support of collective bargaining representatives by the represented employees. And the rationale proffered by the EEOC for construing § 701(j) differently than it had construed the pre-1972 Act will not wash.

The pre-1972 EEOC guideline did not purport to invent a duty of reasonable accommodation; rather, that guideline purported to find that duty in the non-discrimination command of Title VII as enacted in 1964. If that construction of the 1964 Act was correct, there was as much basis before 1972 as after to impute to Congress an intention to override the NLRA.

In 1972 Congress enacted in express terms the substance of the EEOC's guideline, "to resolve by legislation" doubts that had arisen as to whether the EEOC guideline accurately expressed the will of the 1964 Congress. *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 73-74. That the 1972 Congress codified the EEOC's guideline without material change, and without a single reference to the subject of union dues in the legislative history, suggests that Congress accepted the EEOC's published view that the duty of reasonable accommodation did *not* require the exemption of religious objectors from their dues obligations.

b. That Congress had *not* intended in Title VII as enacted or amended to require exemption of religious dues objectors is further convincingly demonstrated by the debates in 1973-74 when such an exemption was expressly proposed, and rejected, under the NLRA (Pet. 15-17). Respondents offer diametrically opposite rationales for ignoring the 1973-74 debates. Respondent Nottelson proffers, without a single citation, an interpretation of those debates made out of whole cloth (Nottelson Br. 16-17); nothing in the debates suggests that Congress' thought processes were what respondent Nottelson hypothesizes. In contrast, the EEOC declares:

> That legislative history is singularly unhelpful . . . because it neither contains any reference to Section 701(j) nor provides any explanation for this omission [EEOC Br. 11].

But the debates *do* provide an "explanation for this omission": proponents and opponents of a compelled dues exemption for religious objectors unanimously agreed that existing law required no such exemption (Pet. 15-17). That § 701(j) was not mentioned reflects that Congress did not understand § 701(j) to have required such an exemption.

c. Both respondents invoke the much-later debates surrounding the 1980 amendment to the NLRA to support their construction of Title VII (EEOC Br. 11-12; Nottelson Br. 17-18). (In the case of EEOC, this invocation is made despite an acknowledgement that the 1980 NLRA amendment adopts a different substantive standard than that claimed for § 701(j) (EEOC Br. 11, n. 10; 12, n. 11).) Neither respondent suggests that these debates are informative of what *the Congress of 1972* intended in enacting § 701(j); rather, all that respondents claim that these debates show is that the 1980 Congress was aware that after 1972 the courts of appeals had construed § 701(j) to require exemption of religious dues objectors (see, e.g., the remarks of Representative Clausen quoted at Nottelson Br. 18). In determining the meaning of § 701(j), "[i]t is the intent of the Congress that enacted [§ 701(j)] in [1972], unmistakable in this case, that controls." *Cf. Teamsters v. United States*, 431 U.S. 324, 354 n. 39. The "views of members of a later Congress," expressed "after this litigation was commenced, are entitled to little if any weight." *Ibid.*[2]

d. In our petition, we relied on the holding of *Hardison, supra*, 432 U.S. at 79, that absent "a clear and express indication from Congress" § 701(j) should not be construed to impliedly repeal core principles of national

[2] The EEOC suggests that even if the Court finds the statutory issue presented in this petition worthy of review, such review should await "a case in which the lower courts have considered the significance of the [1980 NLRA] amendment" (EEOC Br. 12 n. 11). But the amendment predated the decision below, and it was discussed in the briefs of both sides on the petitions for rehearing that the court below denied. Moreover, in one of the other cases now pending before this Court on petition, *Tooley, supra*, No. 81-572, the court of appeals considered the significance of the 1980 NLRA amendment in its opinion (See petition in No. 81-572, 7-8 n. 2a, 17 n. 11, App. 4a-5a).

labor policy articulated in the NLRA. The EEOC asserts that the declaration in *Hardison* was confined to seniority systems, and was premised on the explicit protection afforded seniority systems in Title VII itself (EEOC Br. 13-14). That is a misreading of *Hardison*. The holding in question appears in Part B(1) of that opinion, 431 U.S. at 79, and is not at all linked (or confined) to the special status accorded seniority systems. In a separate portion of the opinion, Part B(2), the Court declared, as an alternative or additional basis for its holding, that the conclusion reached in Part B(1) "is supported by the fact that seniority systems are afforded special treatment under Title VII itself," *id.* at 81.[3]

II. THE CONSTITUTIONAL ISSUE.

a. Both respondents attribute to us a constitutional challenge we do not make: that § 701(j) is unconstitutional *en toto* (EEOC Br. 14; Nottelson Br. 11). We contend only, as reflected in the second question presented (Pet. i; see also *id.* at 19-20), that § 701(j), if construed to require other employees to subsidize union representation for religious objectors, is "to that extent invalid." It is the attribute of compelled monetary preference that we contend renders the construction below vulnerable under the Establishment Clause. Accommodations without that attribute, such as those actually proposed by the employer in *Hardison*, 432 U.S. at 77-78, would lie outside the ambit of our challenge.

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[3] The EEOC also argues that our reliance on national labor policy is unwarranted because "broad exceptions to the general authorization of union security clauses are . . . found in the NLRA" (EEOC Br. 14, n. 13). But that Congress prior to 1972 had made *other* exceptions to the authorization of union security clauses, but *not* an exception for religious dues objectors, proves our point, not the EEOC's.

b. The EEOC contends that § 701(j) as construed below does not impose a monetary preference, because dues objectors must contribute an amount equal to dues to charity (EEOC Br. 18 n. 17). That contention ignores (i) that many persons make charitable contributions in any event, so that under the construction below many dues objectors *will* receive a monetary benefit, in contrast to other employees who will have to make charitable contributions *in addition to* their dues payments; and (ii) that those who would have *secular* preferences for making charitable contributions in lieu of paying union dues are denied this option, which is made available to religious objectors solely on the basis of their religion.

c. The EEOC contends that even if a monetary preference *does* result from the construction of § 701(j) by the court below, that preference does not constitute "financial support of religious activity" (*ibid.*). But the EEOC overlooks that the very "religious activity" that is the subject of this case is the withholding of money from unions. As construed below, § 701(j) requires unions to furnish free representation to those who wish to engage in this "religious activity," thus compelling unions (and ultimately the other members whose dues must subsidize the religious objectors) to provide "financial support of [this] religious activity."

d. The EEOC's contention that § 701(j) as construed below "simply defines the conduct that constitutes . . . discrimination," (EEOC Br. 15 n. 14) begs the question. As this Court recognized in *Hardison*, 432 U.S. at 81, § 701(j) does not mandate "non-discrimination" in the ordinary sense of that word, it mandates special accommodations along religious lines. The permissible limits of governmental compulsion of such preferences is in-

evitably a delicate question, and one that cannot be avoided by resort to semantics.

e. Respondent Nottelson contends that Congress was *required* to exempt religious objectors from union security agreements, for otherwise Congress, which has put the "imprimatur of federal law upon" such agreements, would be violating the Free Exercise Clause. (Nottelson Br. 20-24). Passing the question whether governmental action requiring all employees to pay dues to unions would violate the Free Exercise Clause,[4] respondent's argument founders on the threshold point that the government has *not* put "the imprimatur of federal law" upon such agreements in industries regulated by the NLRA. The quoted words come from *Railway Employees' Department v. Hanson*, 351 U.S. 225, 232, in which this Court held that *the Railway Labor Act, by preempting state "right to work" laws*, put the "imprimatur of federal law" upon union security agreements. But the NLRA, unlike the Railway Labor Act, does *not* preempt state "right to work" laws. Sec. 14(b), 29 U.S.C. § 164(b). All that Congress has done in the NLRA is to refrain from *invalidating* union security agreements, and there is thus no governmental action subject to the command of the Free Exercise Clause.[5]

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[4] The lower courts have held that it would not, see Pet. 11.

[5] The EEOC notes, correctly, that governmental action would be present if a court *enforced* a union security agreement at a union's request (EEOC Br. 19-20 n. 18). But there was no such involvement in this case; here, a private employer and union voluntarily negotiated and implemented a collective bargaining agreement that does not itself constitute governmental action. *Steelworkers v. Weber*, 443 U.S. 193, 200.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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